IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT WALKER IN OPPOSITION

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District of Columbia Circuit)

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OPINIONS BELOW

The opinion of the court of appeals in the principal case on the issues raised in the petition, United States v. Bailey et al. (Pet. App. 1a), is reported at 585 F.2d 1087. The opinion in the related case, United States v. Cogdell (Pet. App. 100a), is reported at 585 F.2d 1130.

STATEMENT OF THE CASE

Respondent Walker does not object, for the purposes of the petition, to the Government's statement of the case.[1/] He has certain disagreements with the Government's description of the decision of the court of appeals, but those are so closely tied to the reasons for denying the writ that they are discussed below.

REASONS FOR DENYING THE WRIT

The petition of the United States has exaggerated the novelty and significance of the opinion below and presents issues which the Government did not press before the court of appeals. There is no reason for this Court to consider any issue relating to the recently developing law of duress and intent in prosecutions for escape under 18 U.S.C. § 751(a) (1976).

A. This Case Does Not Present Any Significant Question Relating to the Immediacy of Threatened Harm as an Element of the Duress Defense in Escape Cases.

The Government's petition argues in the strongest terms that this case presents the issue whether the "immediacy requirement" is to be "severed * * * from the duress defense." Pet. 2, question 2(a), and Pet. 17-18. The court of appeals,

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1/ Were this case considered on the merits, a considerably more detailed treatment of respondents' evidence supporting their duress defense would be required. For example, there was testimony not only that fires in the cell block were "frequently set" (Pet. 4), but that they were set "every day" (Tr. 150); testimony that those fires were set not only by "other jail inmates" (Pet. 4), but also at times by correctional officers (Tr. 371, 378, 381). The evidence in support of respondent Walker's epileptic condition was presented not soley by his own testimony, as the petition may imply (Pet. 5 n.3), but by the testimony of several other witnesses as well (Tr. 603-04, 625, 650-52).

however, did not "sever" the immediacy requirement, in part because respondent's evidence manifestly satisfied any reasonable "immediacy requirement" and in part because the adequacy of respondents' duress evidence -- apart from the failure to return to custody -- had been, for all practical purposes, conceded by the Government below.

Although the district court permitted respondents' to present their evidence of duress, at the close of trial it accepted the Government's position that returning to custody was a necessary element of the defense, see People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), and refused to instruct on the duress defense because of respondents' failure to show that they had voluntarily returned to custody. Tr. 725, 777. As the court of appeals later noted (Pet. App. 22a n.43), the trial court expressly stated that if respondents had satisfied the return requirement, it would have instructed the jury on the defense. Tr. 778-79. The Government registered no objection.

On appeal, the Government did not list as an issue on appeal that respondents did not present sufficient evidence of threats of "immediate harm." Instead, the relevant argument section of its brief was devoted to defending the trial court's ruling on its own terms -- that the return requirement was appropriate to the duress defense in escape cases and that respondents had failed to meet it. It was only in a footnote at the end of this argument that the Government may have technically preserved an issue relating to the immediacy requirement.[2/]

2/ The footnote reads:

> "Evidence as to the other requirements discussed in Lovercamp was also sadly lacking. The conditions described by numerous witnesses called by the defense could hardly be found to establish

(Footnote contined on next page)

Under these circumstances, the court of appeals below treated the Government as having conceded, for all practical purposes, the adequacy of the duress evidence presented by respondents, apart from the issue of return to custody. The court of appeals stated in a footnote: "Since the court's instruction [on duress] would have been given but for the return requirement, the choice of evils issue in this case turns on the validity of that requirement." Pet. App. 22a-23a n.43 (emphasis added). The language in the court of appeals' opinion upon which the Government relies for the allegedly significant holding appears in another footnote (Pet. App. 21a, n.39), manifestly written in reply to the dissent. Judge Wilkey argued at some length that the respondents had not presented adequate evidence of threats of "immediate harm" (Pet. App. 38a-43a, 63a-64a). In note 39, accordingly, the court of appeals remarked that the trial judge had not agreed with the dissent on this point and stated, in addition, that in its view of the trial court had been correct.

It is true in the last sentence of note 39 the court of appeals acknowledged that the practicalities of escape make it unlikely that nonviolent escape will ever be in response to "immediate threat" if that term is taken narrowly; and it expressed the view that the duress defense should be available in broader circumstances. It made no effort at all, however to elaborate on what degree of immediacy is required before

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> the seriousness, immediacy, and imminence of the alleged danger to appellant's well-being. The record is devoid of any reference to an assault or even the utterance of a threat within two weeks before the escape." Brief for U.S. in Ct. App. 28 n.29.

threatened harm no longer justifies an escape. To the Government, this omission means that the court "amputated" the immediacy requirement from the defense of duress. A more sensible interpretation is that the court believed the testimony of assaults and threatened assaults by correctional officers and of of dangerous smoke from fires set every day (as even the dissent acknowledges, Pet. App. 36a), adequate to meet any reasonable test of "immediate harm." No elaboration of the test of immediacy was necessary because the issue was not pressed by the Government on appeal.[3/]

In sum, the court of appeals did not make a substantial change in the law of duress relating to the requirement of "immediate harm." It briefly found the respondents' evidence of immediate harm sufficient, in the face of a virtual concession by the Government. It made no significant ruling meriting review by this Court.

B. This Case Does Not Present Any Question Relating to Whether an Attempt to Seek Administrative or Judicial Correction of Improper Jail Conditions Before Escape Is a Prerequisite to the Duress Defense.

The Government's petition also appears to argue that this case presents the question whether a prisoner may present a defense of duress to an escape charge when he has failed to avail himself of administrative and judicial remedies to improper jail conditions before escaping. Pet. 2, question 2(b), and Pet. 13, 17, 20. Such failure would violate another of the five requirements for the duress defense set out in People v. Lovercamp, supra. This issue, to the extent that it is separate,[4/] was neither preserved nor ruled upon below.

This district court's refusal to instruct the jury on the defense of duress was based solely on respondents' failure to return to custody. Pet. 6. On appeal, the Government did not list the issue of failure to seek administrative or judicial relief as an issue in its brief and not argue such an issue in the relevant section of its brief. Even the footnote that may have technically preserved an "immediate harm" issue (quoted above, note 2), did not mention failure to seek administrative or judicial relief. Finally, the opinion of the court of appeals does not so much as mention the issue.

For all of these reasons, the issue of failure to seek administrative or judicial relief is not properly presented by the Government's petition.[5/]

3/ Even if the Government was surprised by the court of appeals' treatment of immediate harm, it did not argue the matter below as a reason for the granting of its petition for rehearing and suggestion for rehearing en banc. Its pressing of this issue in this Court, accordingly, represents a substantial change of position.

4/ The Government's petition is not entirely precise on the issue it intends to raise on this matter. The question presented -- number 2(b), Pet. 2 -- combines the issue with that of failure to return to custody suggesting that the Government may be raising failure to exhaust administrative and judicial remedies as part of respondents' post-escape conduct. See also Pet. 17. Other parts of the petition, however, particularly the reiteration of the theme that escape must not be a "self-help remedy for undesirable prison conditions" (Pet. 13) makes sense only if the failure to seek administrative and judicial relief before escape is being raised. See also Pet. 20. Respondents contend that no issue relating to failure to seek relief is properly presented; additional reasons for this position with respect to post-escape conduct appear below.

5/ It should also be noted that there was evidence in the record of attempts to bring the alleged threats by correctional officers to the attention of authorities, e.g., Tr. 478-80, including a suit by respondent Bailey in Superior Court, Pet. App. 4a-5a n.6. And it is difficult to believe that the Government would argue that the jail authorities would not be deemed to have notice of regular fires in any particular section.

C. The Holding Below on the Failure to Return to Custody As It Relates to Duress Does Not Merit Review by This Court.

The Government contends that the holding of the court of appeals on duress -- that respondents' failure to return to custody did not bar consideration of the duress defense -- constitutes a holding that "the prisoner may remain at large with impunity until such time as the harsh conditions of confinement are corrected" (Pet. 18) and conflicts with the recent decisions of two federal courts of appeals (Pet. 19). Neither contention is correct.

1. The Government Has Inaccurately Stated the Holding of the Court of Appeals on the Failure to Return to Custody and Mischaracterized the Significance of That Holding.

The Government asserts that the court of appeals made a holding much broader than in fact it did. The court of appeals, according to the Government, held that

> "even if there was no imminent threatened harm at the time of the escape, the prisoner may remain at large with impunity until such time as the harsh conditions of confinement are corrected." Pet. 18.

The court of appeals had before it a case that presented only one issue on duress: whether the failure to return from custody barred the presentation of a defense of duress on an indictment that charged only the act of departing from the jail. The court did rule, contrary to respondents' argument, that escape was a "continuing offense" -- one that could be committed by failing to return to custody as well as by the initial departure. See Pet. 10a n.17, and 24a-26a. It agreed with respondents, however, that the issue at trial below had been

respondents' conduct and state of mind at the time of the initial departure from jail and nothing else.

> "[A]ppellants were indicted for 'flee[ing] and escap[ing]' '[o]n or about August 26, 1976,' and the trial court's instructions, rather than explaining a 'continuing offense' concept to the jury, emphasized the notion that the offense took place when appellants left the jail on August 26. Thus this is not a case where the jury was considering whether a defendant had escaped by failing to return." Pet. App. 25a (emphasis added).6/

Accordingly, the district court had erred in treating respondents' subsequent conduct (their failure to return to custody) as conclusive as to their state of mind and behavior at the time of the initial departure.

> "In effect, the trial court denied appellants' right to have the jury consider a duress defense to a crime with which they have been charged (escaping on August 26) because the court found that they would in any event be guilty of an offense under a theory (failure to return) that was never presented either to appellants or to the jury. We cannot sanction such an obvious violation of appellants' constitutional right to jury trial." Pet. App. 25a-26a (emphasis in original).

The court of appeals expressly did not "consider exhaustively the proper prerequisites" to a duress or choice-of-evils defense in escape cases, since it did not know the nature of the instruction almost given by the trial court. (Pet. App. 26a.) There can be no doubt at all that it did not make any holding as to the elements of a duress defense in a case involving an indictment charging escape as a "continuing offense" since such an indictment was not before the court. Thus the

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6/ The indictment for Walker read: "On or about August 26, 1976, * * * RALPH WALKER, having been lawfully committed to the custody of the Attorney General on April 11, 1973, by virtue of a [federal] conviction and sentence * * *, did unlawfully and wilfully flee and escape from such custody." R. 32.

court did not even suggest, much less hold, that when a prisoner has initially departed jail to escape improper conditions, he "may remain at large with impunity until such time as the harsh conditions of confinement are corrected." (Pet. 18.)

The Government has misconstrued footnote 52 of the court's opinion (Pet. App. 26a), where the court noted:

> "An acceptable version of the 'return requirement' would include (1) an instruction that escape is a continuing offense, and (2) an instruction that a choice of evils defense cannot justify continued absence if the conditions establishing the defense (whatever the court determines them to be) do not continue for the period a prisoner remains at large." (Emphasis added.)

The words "conditions establishing the defense" do not refer only to the harsh jail conditions that may or may not excuse an initial departure, but refer to all the conditions ("whatever the court determines them to be") that would be relevant in determining whether continued absence from jail could be excused. There is no justification for suggesting that the court of appeals intended, in this brief footnote, to enter the deep waters surrounding issues not presented in this case and to make the unlikely holding stated by the Government.

A correct understanding of the holding below reveals its extremely limited significance. The court's decision in respondents' favor on the duress issue depended on the narrowly drawn indictment. Had the indictment been drafted -- as we have no doubt indictments in the future will be drafted -- to charge escape as a "continuing offense," respondents would have been faced with the task of justifying not only their initial departure but also their continued failure, thereafter, to return to custody. It is a substantial question -- not addressed by the court below -- whether any of these respondents could

have satisfied a judge that he was entitled to go to the jury on a duress or choice of evils defense relating to continued absence from custody.[7/]

Since the Government can avoid in the future the immediate consequences of the holding below on the duress defense simply by redrafting escape indictments, that holding is not worthy of review by this Court.

2. The Holding Below on the Failure to Return to Custody Does Not Conflict with the Decisions of Other Federal Courts of Appeals.

The Government principally contends that the holding of the court of appeals on duress -- that respondents' failure to return to custody did not bar consideration of the duress defense -- conflicts with the decision of the Ninth Circuit in United States v. Michelson, 559 F.2d 567 (1977). See Pet. 19. Like the court of appeals below, respondents disagree.

Michelson's evidence of duress concerned fear of assault by another inmate, who was confined in the prison from which Michelson escaped. The Ninth Circuit, like the court of appeals below, held that escape under 18 U.S.C. § 751(a) is a "continuing offense," i.e., one that can be committed by continued absence as well as departure from prison. 559 F.2d at 570. Unlike the court of appeals below, however, the Ninth Circuit manifestly assumed that the "continuing offense" was properly charged in the case before it, for it held that the asserted duress defense did not excuse "continued absence from custody." See, e.g., 559 F.2d at 571:

7/ Respondent Walker testified not only that he "contacted the FBI on a number of occasions" after his escape (Tr. 710), but that he had information that the FBI would kill him if they found him (id). In addition, he testified that he was afraid that he would be returned to the same jail if he were caught. Tr. 711.

> "In this case, we need not and do not decide whether defendant acted out of duress in escaping. His failure to report to the proper authorities during his nearly two years of freedom following his escape from McNeil Island Penitentiary precludes jury consideration of the asserted duress defense. Whatever the merits of the asserted duress defense, it did not license continued absence from custody."

Thus the Michelson decision is not in conflict with the decision below on failure to return to custody because it nowhere addressed the consideration found determinative below -- that escape as a "continuing offense" had not been charged in the indictment. The court of appeals below found Michelson distinguishable for this reason. Pet. App. 23a-26a. Judge Wilkey, in dissent, did not charge the court with issuing a ruling facially inconsistent with Michelson; instead, he attacked the court's construction of the indictment and instructions at trial. Pet. App. 60a-63a. The Government does not appear to raise this different matter -- whether these respondents were in fact charged with and tried for departure from jail rather than continued absence -- as an issue meriting review on writ of certiorari; it certainly has not, and we believe cannot, demonstrate a conflict in the circuits on this issue.

The only other federal court of appeals' decision with which the Government claims a conflict on the failure to return to custody issue is United States v. Boomer, 571 F.2d 543 (10th Cir. 1978). Pet. 19. That case differs from the decision below in several respects: the charge was attempted escape, the duress defense did go to the jury, and the relevant issue on appeal was the propriety of an instruction requiring an intent "to report immediately to the proper authorities," 571 F.2d at 545. What is most significant, however, is that the court essentially

relied on the Ninth Circuit's recent decision in Michelson, with which we have shown the decision below does not conflict.[8/]

The Government states its alleged conflict in the circuits on the duress issue in the following words:

> "Other courts have held that, when an imminent threatened harm justifies an escape under the theory of duress, the prisoner must immediately report to proper authorities after the escape and seek a lawful civil remedy for the threatened harm. Pet. 19.

A correct understanding of the limited holding below reveals that the decision below is not inconsistent with this statement of the law, given that respondents were not charged with escape as a "continuing offense."

8/ The Government also contrasts the decision below on failure to return to custody with two state cases: People v. Lovercamp, supra, and State v. Boleyn, 328 So. 2d 95 (La. 1976). The manner in which state courts construe state statutes prohibiting escape, and the common law or statutory defenses to such crimes, is of course a different matter from the appropriate construction of a federal statute and the common law defenses appropriate to it. In any event, neither the duress defense nor the choice of evils defense set out in the Model Penal Code contains a return requirement. Model Penal Code §§ 2.09 and 3.02 (Proposed Official Draft 1962). And, as the court below pointed out, two state courts have specifically rejected the Lovercamp rule that return is a prerequisite to a duress defense. See Pet. App. 20a-21a n.3/, where the court quoted passages from People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977). See also People v. Luther, 394 Mich. 619, 232 N.W.2d 184 (1975), where the court, after listing the Lovercamp conditions, said:

> "To the extent that competent evidence may be produced as to any of these conditions, it is relevant to the claim of duress. As such, it should be submitted to the jury." 232 N.W.2d at 187 (emphasis added).

A more recent state decision rejecting the Lovercamp conditions is Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978), where the court said:

> "The preconditions set forth in Lovercamp are, in our view, matters which go to the weight and credibility of the testimony upon which the defendant bases his prima facie case [of duress]." 576 P.2d at 1132 (emphasis added).

D. The "Specific Intent" Question Presents No Issue Meriting Review By This Court.

The Government presents to this Court the issue of the court of appeals holding that "an intent to avoid confinement" (Pet. App. 8a) is an element of the crime of escape under 18 U.S.C. § 751(a). Pet. 2, question 1, and Pet. 14-16. This holding, it claims, "depart[s] radically from prior analysis of the crime of escape" and "is in conflict with numerous state and federal decisions." Pet. 13.

Rather than departing radically from prior analysis of the crime of escape, the court of appeals below expressly followed the one recent and well-considered decision of a federal court of appeals on the intent element of escape under Section 751(a): United States v. Nix, 501 F.2d 516 (7th Cir. 1974). The Seventh Circuit in that case carefully analyzed the state of the law and various problems that appeared in the cases relating to intent. It found that "[m]ost courts, confronted with evidence that a defendant could not or did not form an intent to leave and not to return, have held such an intent essential to proof of the crime of escape." 501 F.2d at 518. Accordingly, it enunciated a definition of escape as "a voluntary departure from custody with an intent to avoid confinement." 501 F.2d at 519.

The court of appeals below followed Nix and expressly concurred with its definition of escape under Section 751(a). Pet. App. 6a, 8a. That decision required reversal of the judgment below, since the trial judge had not instructed the jury in

those terms.[9] See Pet. App. 12a.

In spite of the fact that the court of appeals' decision below echoes that of Nix, and in spite of the fact that the Nix court thought that "courts have been close to unanimous in requiring intent to escape," 501 F.2d at 519 (see also Pet. App. 7a-8a n.13), the Government asserts that "federal decisions have consistently construed the escape statute to require only the general intent to depart from the boundaries of lawful custody." Pet. 15. Three federal decisions are cited for this proposition: United States v. Jones, 569 F.2d 499 (9th Cir. 1978); United States v. Cluck, 542 F.2d 728, 731 n.2 (8th Cir.), cert. denied, 429 U.S. 986 (1976); and United States v. Woodring, 464 F.2d 1248, 1251 (10th Cir. 1972). These decisions are explained more fully in the margin, but the grounds for distinguishing them may be briefly set forth. In Woodring, the issue was not before the Court and the Government relies on one clause of dictum.[10] In

9/ The jury was instructed as follows:

> "Intent means that a person had the purpose to do a thing. It means that he made an act of the will to do the thing. It means the thing was done consciously and voluntarily and not inadvertently or accidentally.
>
> * * *
>
> "[T]he intent which is involved * * * is the general intent, and it means only that a defendant has the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally." Tr. 799, 803.

10/ In Woodring, the relevant issue was whether the Government had proved specific intent, since the trial court had instructed the jury that "specific intent must be proved before there can be a conviction." 464 F.2d at 1251. In what the court of appeals below accurately characterized as a "cryptic and conclusory reference" (Pet. App. 12a), the Tenth Circuit said:

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Cluck, where the issue was also not presented and the Government relied on a footnote, the court specifically cited the Nix holding on intent and did not repudiate it.[11/] And in Jones, where a different, though related, issue was presented, the court claimed to be following Nix.[12/]

In sum, then, there is no conflict in the circuits on the issue of intent.[13/] In ruling that intent to avoid confinement is an element of escape under Section 751(a), the court of

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> "The instruction on specific intent is not erroneous where willfulness is in the indictment. Even though specific intent is not an element of § 751(a), specific intent became the law of the case when the Court gave Instruction No. 11." 464 F.2d at 1251 (emphasis added).

We note, in addition, that respondents in this case were indicted for escaping "unlawfully and willfully," as the court of appeals itself noted. Pet. App. 13a n.22. See, e.g., p. 8 n.6 supra.

11/ In Cluck, as in Woodring, the case had gone to the jury on instructions requiring a finding that defendant left his place of confinement (here a hospital) "willfully and with the specific intent to avoid further confinement therein." 542 F.2d at 736. The principal issues related to sufficiency of evidence, both respect to custody and intent, and defendant had made "only a vague objection to the instruction on intent." Id. At the beginning of the opinion, the court observed that "[i]n United States v. Nix, * * *, the court defined an 'escape' as being a voluntary departure from custody with intent to avoid confinement." 542 F.2d at 731. It then dropped the following footnote, upon which the Government relies for its alleged conflict (Pet. 15):

> "The statute does not in terms make intent an essential element of the offense. The departure from custody must, of course, be voluntary and conscious. [Citation omitted.] In any event, the case was tried on the theory that it was incumbent on the government to prove willfulness and intent to escape and that theory became the law of the case [citing Woodring]." 542 F.2d at 731 n.2.

If it appears that this footnote reserves the question whether the Eighth Circuit concurs with Nix and whether the instructions that were given were proper, this impression is dispelled at the end of the opinion, where, with respect to the instructions on custody and intent, the court said:

> "We have considered those instructions along with the other instructions given by the trial court, and we find that the instructions, including the challenged ones, stated the applicable law fairly and correctly and did not invade the province of the jury." 542 F.2d at 736 (emphasis added).

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In any event, it is clear that the Eighth Circuit did not have before it the issue of "intent to avoid confinement" as an element of escape under Section 751(a) and, to the extent that it considered the issue, chose not to repudiate the holding of Nix.

12/ In Jones, defendant had failed to return to a half-way house when required to do so by his week-end pass. His prosecution for escape under Section 751(a) thus depended on another statute, 18 U.S.C. § 4082(d), that makes "willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed * * *" escape under Section 751(a). Although the court affirmed the trial court's refusal to give defendant's required instruction that proof of "intent to avoid confinement" was not required, the court relied on the adequacy of the trial court's instructions on "willfulness," which "adequately conveyed to the jury the necessity that they find a 'blameworthy' mental state as an element of the offense," citing Nix. 569 F.2d at 501 n.3. The court also appeared to rely on the fact that Jones' intent to violate "the extended limits of his confinement" was undisputed. See 569 F.2d at 501. Jones' pass required him to stay within the county and avoid any criminal activity. The Government proved, and it does not appear to have been disputed, that Jones left the county, travelling 175 miles by bus, was apprehended after committing a burglary, and gave a false name when apprehended. 569 F.2d at 500. It thus appears that Jones was arguing that the jury should have been instructed that it had to find not only an intent to violate the extended limits of his confinement but also an intent never to return to custody. In any event, the Ninth Circuit expressed no disagreement with Nix.

13/ In support of its conflict in the circuits, the Government provides a "see also" citation to United States v. McCray, 468 F.2d 446, 448 (10th Cir. 1972); United States v. Chapman, 455 F.2d 746, 749 (5th Cir. 1972); and Chandler v. United States, 378 F.2d 906, 908 (9th Cir. 1967). Pet. 15. All of these decisions, like Woodring, pre-date Nix, and none of them specifically addressed the question of intent to avoid confinement addressed in Nix and in the decision below. McCray contains no discussion of any issue relating to the petition. Chapman (the only decision from a circuit not represented by Jones, Cluck and Woodring) concerned the question whether the crime of escape could be committed by a prisoner with a legitimate defense of duress (because of fire) to his initial departure; the court ruled that it could if the prisoner thereafter forms "an intent not to return to

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appeals followed Nix, the circuit decision most closely on point and the precedent that no other circuit has subsequently disagreed with. While Nix was decided on a different set of facts from those presented below -- hence the efforts of the Government (Pet. 15 n.13) and the dissent (Pet. App. 79a-81a) to distinguish it -- it plainly is the most carefully considered decision on the issue of intent, and it plainly announced a rule going beyond the facts of that case. Until that decision has been repudiated by other circuits -- as the Eighth, Ninth, and D.C. Circuits have declined to do -- there will be no conflict in the circuits meriting review by this Court.

What troubles the Government, it appears, is not so much the basic holding of the court below -- that intent to avoid confinement is an element of escape under Section 751(a) -- but the court's view of what sort of evidence might disprove the required intent. It was only in a footnote that the court below undertook to elucidate the "intent to avoid confinement." There the court said, inter alia:

> "[I]f a prisoner offers evidence to show that he left confinement only to avoid conditions that are not normal aspects of 'confinement' -- such as beating in reprisal for testimony in a trial, failure to provide essential medical care, or homosexual attacks -- the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such 'non-confinement' conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant also intended to avoid confinement." Pet. App. 9a n.17 (emphasis in original).

The Government protests that this construction "is without support in the common law or the history of the statute." Pet. 14. The Government's commitment to an unchanging common law of escape differs remarkably from its position on other issues in this case. The court of appeals accepted the Government's position that escape under Section 751(a) can be committed by continuing absence from prison as well as by initial departure, though this meaning is not apparent from the words or history of the statute (see Pet. App. 25a n.48); and the court of appeals accepted the Government's expansive notion of "custody," holding that one may escape from the custody of the Attorney General, within the meaning of Section 751(a), even though one has been transferred to the custody of the Superior Court or the Warden of the D.C. Jail (Pet. App. 27a-34a).[14/]

The concerns that led the court of appeals below to the language in footnote 17 are amply set out in the Nix decision. See also the dissenting opinion of Judge Seiler in the striking case of State v. Green, 470 S.W.2d 565 (Mo. 1971), cert. denied, 405 U.S. 1073 (1972) (escape by 19-year-old inmate to avoid imminent threatened homosexual rape). Those concerns are as old as the crime of escape, and courts have dealt with them in different ways. Modern concern about violence and intolerable conditions in prisons has led in recent years to a re-examination of many

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federal custody." 455 F.2d at 749-50. Chandler ruled, in a similar fashion, that even though defendants may have wandered outside the prison camp while intoxicated, their later decision "to take off for more hospitable climes" constituted escape. 378 F.2d at 908. The latter two decisions were cited with approval by the court of appeals below, in the course of its decision that "continued absence" from prison could constitute the crime of escape under Section 751(a). Pet. App. 10a n.17. The decisions do not conflict with that below on the issue of intent.

14/ The latter issue is presented in the conditional cross-petition for writ of certiorari by respondent Bailey (No. 78-5904) and by respondent Walker (No. 78-5889). The brief in opposition filed by respondent Bailey in this proceeding (No. 78-990) includes additional material (pp. 13-21) in support of his conditional cross-petition (No. 78-5904). Mr. Walker hereby adopts that material in support of his own conditional cross-petition (No. 78-5889). To repeat what was said in the conditional cross-petition, Messrs. Bailey and Walker are identically situated with respect to the custody issues that they have raised.

aspects of the crime of escape. People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), a case upon which the Government relies on the issue of failure to return to custody, is one of the earlier examples of modern concern about the crime. Yet the Government's professed concern that "escape prosecutions will become wide-ranging investigations into the adequacy of prison conditions" (Pet. 16) argues against any defense of duress or necessity to the crime of escape, contrary to the weight of modern authority.[15/]

The significance of the holding below on intent will depend on the legal rules that develop about the extent of evidence necessary to require specific instructions on such matters as intolerable jail conditions. Such rules have not yet been enunciated by the court of appeals below, and the issue has not yet been considered by the circuits.[16/] Review of the matter by

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15/ The Government's full statement is that "escape prosecutions will become wide-ranging investigations into the adequacy of prison conditions, rather than a means of enforcing lawfully imposed criminal sentences." Pet. 16. But it is recapture, not prosecution for escape, that leads to the enforcement of the original sentence. The escape prosecution is to ascertain blameworthiness and to impose an additional sentence for a separate criminal act. Such a prosecution may raise any of a number of burdensome issues for the prosecution (like insanity or, as in this case, custody).

Moreover, the Government's concern that juries will be "dictating to prison administrators the conditions of confinement that are normal and appropriate" (Pet. App. 16 n.14) ignores the fact that it is judges who will be instructing the juries on the proper standards to apply. While some deference to prison administrators is necessary and appropriate, we doubt that the Government means to argue that the history of penal conditions in this country indicates that prison officials may be left unrestrained by law.

16/ Since the court of appeals below held that escape under Section 751(a) is a "continuing offense," the question arises what sort of evidence might defeat the "intent to avoid confinement" when one is indicted and tried for continued absence rather than for the act of departure alone. The court of appeals clearly did not consider this question. Since such prosecutions are likely to be the most common in the future, this omission illustrates the uncertain significance of the decision below.

this Court now would lead the Court into a theoretical exercise, unrelated to issues and instructions argued and decided in different circuits.

CONCLUSION

The Government has asked this Court to review a decision that reversed the convictions below on two separate grounds -- one relating to the elements of the defense of duress to escape prosecutions and one relating to intent to avoid confinement as an element of escape. The long range significance of neither decision is plain, given the fact that the indictments below did not charge escape as a "continuing offense." Nor do the claimed conflicts in the circuits on each issue prove to exist in any meaningful sense. The law of escape is a rapidly developing area, in which there are few federal decisions on any particular issue or set of facts. This Court's decision to review the issues in this field now would deprive it the benefit of experience with the rules being announced in the circuits and would deprive it of the considered judgments of more of those circuits.

For all of these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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